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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-1552

CLAUDIO CASTANEDA, SHERIFF, *Petitioner*

v.

RODRIGO PARTIDA, *Respondent*

**On Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit**

## BRIEF FOR THE PETITIONER

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# INDEX


| | Page |
|---|---|
| Opinion Below | 1 |
| Jurisdiction | 1 |
| Questions Presented | 2 |
| Constitutional Provisions and Statutes Involved | 2 |
| Statement of the Case | 5 |
| Summary of Argument | 7 |
| Conclusion | 9 |
| Certificate of Service | 10 |


# CITATIONS


| CASES | Page |
|---|---|
| Cassels v. Texas, 339 U.S. 282 | 8 |
| Partida v. Castaneda, 384 F.Supp. 79 | 8 |
| Partida v. The State, 506 S.W.2d 209 | 5 |
| Swain v. Alabama, 380 U.S. 202 | 8 |
| Taylor v. Louisiana, 95 S.Ct. 692 | 8 |

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### OPINION BELOW

The opinion delivered by the Fifth Circuit Court of Appeals, is reported at 524 F.2d 481 (1975).

### JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit was entered on December 11, 1975, and the Petition for Certiorari was filed in this Court on April 26, 1976. Certiorari was granted on June 14,

1976. The jurisdiction of the Supreme Court is invoked pursuant to 18 U.S.C. Sec. 1254(1).

## QUESTIONS PRESENTED

I. Whether or not the Petitioner rebutted the Respondent's prima facie case of discrimination in grand jury selection.

II. Whether or not the decision of the United States Court of Appeals for the Fifth Circuit is in conflict with several Supreme Court decisions.

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

*United States Constitution,* Amendment Fourteen, Sec. 1:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".

*Texas Code of Criminal Procedure, Annotated,* Article 19.01 (Amended):

> "The district judge, at or during any term of court, shall appoint not less than three, nor more than five persons to perform the duties of jury commissioners, and shall cause the sheriff to notify them of their appointment, and when and where they are to appear. The district judge shall, in the order appointing such commissioners, designate whether such commissioners shall serve during the term at which selected or for the next succeeding term. Such commissioners shall receive as compensation for each day or part thereof they may serve the sum of Ten



> Dollars, and they shall possess the following qualifications:
>
> 1. Be intelligent citizens of the county and able to read and write the English language;
>
> 2. Be qualified jurors in the county;
>
> 3. Have no suit in said court which requires intervention of a jury;
>
> 4. Be residents of different portions of the county; and
>
> 5. The same person shall not act as jury commissioner more than once in the same year."

*Texas C.C.P., Annotated,* Article 19.03:

> "When the appointees appear before the judge, he shall administer to them the following oath: 'You do swear faithfully to discharge the duties required of you as jury commissioners; that you will not knowingly elect any man as juryman whom you believe to be unfit and not qualified; that you will not make known to any one the name of any juryman selected by you and reported to the court; that you will not, directly or indirectly, converse with any one selected by you as a juryman concerning the merits of any case to be tried at the next term of this court, until after said cause may be tried or continued, or the jury discharged'."

*Texas C.C.P. Annotated,* Article 19.06, (Amended):

> "The jury commissioners shall select not less than 15 nor more than 20 persons from the citizens of different portions of the county to be summoned as grand jurors for the next term of court, or the term of court for which said commissioners were selected to serve, as directed in the order of the court selecting the commissioners."

*Texas C.C.P., Annotated,* Article 19.08, (Amended):

"No person shall be selected or serve as a grand juror who does not possess the following qualifications:

1. He must be a citizen of the state, and of the county in which he is to serve, and be qualified under the Constitution and laws to vote in said county, provided that his failure to pay a poll tax or register to vote shall not be held to disqualify him in this instance:

2. He must be of sound mind and good moral character.

3. He must be able to read and write;

4. He must not have been convicted of any felony;

5. He must not be under indictment or other legal accusation for theft or of any felony."

*Texas C.C.P., Annotated,* Article 19.21:

"When as many as twelve persons summoned to serve as grand jurors are in attendance upon the Court, it shall proceed to test their qualifications as such."

*Texas C.C.P., Annotated,* Article 19.22:

"Each person who is presented to serve as a grand juror shall, before being impaneled, be interrogated on oath by the court or under his direction, touching his qualifications."

*Texas C.C.P., Annotated,* Article 19.23 (Amended):

"In trying the qualifications of any person to serve as a grand juror, he shall be asked:



1. Are you a citizen of this state and county, and qualified to vote in this county, under the Constitution and laws of this state?

2. Are you able to read and write?

3. Have you ever been convicted of a felony?

4. Are you under indictment or other legal accusation for theft or for any felony?"

*Texas C.C.P., Annotated,* Article 19.26:

"When twelve qualified jurors are found to be present, the court shall proceed to impanel them as a grand jury, unless a challenge is made, which may be to the array or to any particular person presented to serve as a grand juror."

## STATEMENT OF THE CASE

The Respondent was indicted on March 17, 1972, for the offense of burglary of a private residence at night with intent to rape, contained in the first count of the indictment, and burglary, in the second count of the indictment. Thereafter, on December 19, 1972, the Respondent was found guilty by a jury of burglary of a private residence at night with intent to commit rape, after pleading not guilty.

A pre-sentence investigation was ordered, and on February 16, 1973, the Court sentenced Respondent to serve eight (8) years in the Texas Department of Corrections. From such action, the Respondent appealed. The conviction was affirmed by the Court of Criminal Appeals on March 6, 1974, in *Partida v. The State,* 506 S.W.2d 209. Thereafter, the Respondent filed an application for a Writ of Habeas Corpus in the United States District Court for the Southern District of Texas, claiming discrimination in

the selection of the grand jury which indicted him. A hearing was held on his application. Judge Alamia of the 92nd District Court, the Court which impanelled the grand jury which indicted the Respondent, testified at the hearing concerning the manner of selecting grand jury commissioners and grand jury impanelling. At the request of the Court, the State filed a transcript of the proceedings wherein the grand jury which indicted the Respondent was selected and impanelled. Attached to the transcript of that proceeding was a list of the grand jurors originally selected by the grand jury commissioners which ultimately indicted the Respondent. This list indicates that 50 percent of the names appearing thereon were Spanish. The record indicates that 3 of the 5 jury commissioners, 5 of the grand jurors who returned the indictment, 7 of the petit jurors, the judge presiding at the trial, and the Sheriff who served notice on the grand jurors to appear had Spanish surnames.

On October 26, 1974, the United States District Court denied the application for a Writ of Habeas Corpus and held:

(1) That the Respondent had not waived his right to object by failing to object at an earlier time; and

(2) That the Respondent had established a *bare prima facie* case by proving a long continued disproportion in the composition of the grand juries in Hidalgo County, but the Court held that it has been rebutted.

Thereafter, the Respondent appealed to the United States Court of Appeals for the Fifth Circuit. The Court of Appeals, in its opinion, found that Respondent's prima facie case of discrimination in grand jury selection was not rebutted and ordered the case reversed and remanded.



## SUMMARY OF ARGUMENT

**I. Petitioner did effectively rebut Respondent's prima facie case of discrimination in grand jury selection.**

The Respondent employed the "rule of exclusion" to establish his prima facie case of grand jury discrimination. He produced evidence that the total population of Hidalgo County, Texas, in the year 1970 was 181,535 persons. Of that number, some 143,611, or approximately 79.2%, were persons of Spanish language or Spanish surname. Evidence was then introduced to show the composition of the grand jury "lists" (the 15-20 persons selected by the grand jury commissioners from whom a grand jury panel of 12 is selected) over a ten year period of time, showing a statistical disparity of some 40.02%. The Petitioner countered with sworn testimony of District Judge J. R. Alamia, a Mexican-American, who selected the grand jury commissioners who selected the grand jury that indicted the Respondent. He testified that he had selected three out of five Mexican-Americans as grand jury commissioners. These five commissioners then selected twenty persons for the grand jury "list". Of this number, 50% were Mexican-American. The sheriff who summoned them was Mexican-American. Judge Alamia denied that any sort of discrimination against Mexican-Americans had entered into his selection of the grand jury commissioners. Mexican-Americans constitute a "governing majority" in Hidalgo County. The Texas system of selection of grand jurors allows the subjective element to enter into its jury selection process. Therefore, "if people in charge can choose whom they want, it is unlikely they will discriminate against themselves. A broader range of variation should be tolerated here, because the Texas selection

system allows the governing majority to favor their group when selecting grand jurors". See *Partida v. Castaneda,* 384 F.Supp. 79.

**II. In the instant case the Fifth Circuit has applied the equal protection clause of the federal constitution in a way not entirely consistent with several relevant Supreme Court decisions.**

In the Court of Appeals' opinion, it is stated that "Judge Alamia offered no explanation for the disparity. Indeed, he testified that he sought a balance of grand jury commissioners according to ethnic origin, race, sex and age, *yet he did not instruct the commissioners to do the same.*" (Emphasis added.) It is the Petitioner's position that such instructions from Judge Alamia would be a violation of the principle that "jurymen should be selected as individuals, on the basis of individual qualifications, and not as members of a race". *Cassels v. Texas,* 339 U.S. 282. The Supreme Court has recently held in the case of *Taylor v. Louisiana* that "Our holding does not auger or authorize the fashioning of detailed jury selection codes by federal courts. The fair cross-section principle must have *much* leeway in application . . . Carter v. Jury Commission and other cases recognized broad discretion in the States in this respect. We do not depart from the principles enunciated in Carter." (See *Taylor v. Louisiana,* 95 S.Ct. 692.) The instant case is similar to that of *Swain v. Alabama,* 380 U.S. 202, where the Court held that "Here the commissioners denied that racial consideration entered into their selection of either their contacts in the community or the names of prospective jurors . . . Undoubtedly the selection of prospective jurors was somewhat haphazard and little effort was made to ensure that all groups in the community were fully



represented. But an imperfect system is not equivalent to purposeful discrimination based on race. We do not think that the burden of proof was carried by petitioner in this case." If the Court of Appeals is to require that Texas District Court Judges are to instruct grand jury commissioners to seek out racial and sexual quotas in filling the grand jury list, then it would be meaningless to retain such a system. In effect, the Court of Appeals' decision, by implication, has spelled the doom for the statutory scheme for selection of grand jurors as enacted by the elected representatives of the people of the State of Texas.

Purposeful inclusion of members of a race, sex, class, or ethnic group in a grand jury panel or list is just as constitutionally impermissible as purposeful exclusion of such persons.

## CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Fifth Circuit should be reversed.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I, THOMAS PARKER BEERY, a member of the Bar of the Supreme Court of the United States, do hereby certify that three (3) copies of the foregoing Petition for Writ of Certiorari have been served on Respondent by depositing same with the United States Postal Service, Certified Mail, postage prepaid, addressed as follows: David G. Hall, Law Offices of Texas Rural Legal Aid, Inc., 103 E. Third, Weslaco, Texas 78596, on this the _____ day of July, 1976.

THOMAS PARKER BEERY
Assistant Criminal District Attorney
Hidalgo County, Texas